FILED

JUL 23 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff - Appellee,<br><br>v.<br><br>EFRAIN TRIGUERAS,<br><br>Defendant - Appellant. | No. 02-10000<br><br>D.C. No. CR-01-00315-SRB<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted April 2, 2003
San Francisco, California

Before: B. FLETCHER, KOZINSKI, and TROTT, Circuit Judges.

Defendant-Appellant Efrain Trigueras was convicted by a jury of knowingly and intentionally importing, and attempting to import, more than 100 kilograms of marijuana, in violation of 21 U.S.C. § 952(a). He was sentenced to seventy-eight

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

months' incarceration and four years' supervised release. Trigueras now appeals his conviction, claiming that the district court abused its discretion in allowing portions of his trial testimony to be read back to the jury, and that it also erred in not issuing a limiting instruction along with the readback.

Because Trigueras did not object to the readback at trial, we review for plain error only. Fed. R. Crim. P. 52(b); *United States v. Kessi*, 868 F.2d 1097, 1107 (9th Cir. 1989). In light of the "particular facts and circumstances of [this] case," *United States v. Binder*, 769 F.2d 595, 600 (9th Cir. 1985), *overruled in part on other grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997), and the other evidence against Trigueras, we cannot conclude that the readback resulted in the jury's placing undue emphasis on the testimony they reheard – particularly in light of the fact that the testimony was Trigueras's own.

Nor do we find that *United States v. Lujan*, 936 F.2d 406, 411-12 (9th Cir. 1991), compels a different result. *Lujan* addressed a situation where trial transcripts were furnished directly to the jury, an approach that we have found to be more problematic than that followed here: a readback in open court in the presence of the defendant and counsel. *E.g.*, *United States v. Sacco*, 869 F.2d 499, 502 (9th Cir. 1989); *Binder*, 769 F.2d at 601 n.1.

We agree with the appellant that the district court's handling of the readback was not ideal. At the very least, a limiting instruction to the jury would have been appropriate. However, because the defendant did not object at trial, the standard for reversible error is plain error. There is no plain error here.

AFFIRMED.